EVERCRISP SNACK PRODUCTS (M) SDN. BHD. & ANOR. v. SWEETIES FOOD INDUSTRIES SDN. BHD.

[O.C.J. (Hashim Yeop A. Sani J.) May 29, 1979]
[Kuala Lumpur — Civil Suit No. 2829 of 1978]

Practice and Procedure — Application for interlocutory injunction — Unreasonable delay — No evidence of irreparable damage — Balance of convenience.

Trade Mark — Passing off — Application for interlocutory injunction — Unreasonable delay — No evidence of irreparable damage — Balance of convenience.

The plaintiffs had sought an action alleging that the defendants had used a get up of their product which was calculated to lead to deception and to the belief that the defendants' snack foods were the snack foods of the plaintiffs and to cause the snack foods of the defendants to be passed off as that of the plaintiffs. Subsequently the plaintiffs applied for an interlocutory injunction to restrain the defendants from passing off or attempting to pass off the goods.

Held: (1) there was unreasonable delay in applying for the interim relief and the delay had not been satisfactorily explained;

(2) there was no evidence of irreparable damage to entitle the plaintiffs to the interim relief;

(3) on the evidence available the balance of convenience would seem to be in favour of not granting the interlocutory injunction.

Cases referred to:-

(1) *American Cyanamid* v. *Ethicon* [1975] 2 W.L.R. 316.
(2) *Tavener Rutledge Ltd.* v. *Specters Ltd* [1957] R.P.C. 498.
(3) *Lombard Banking Ltd.* v. *D.H. Lombard Ltd.* (1952) 69 R.P.C. 60.
(4) *Bravingtons Ltd.* v. *Barrington Tennant* [1957] R.P.C. 183.
(5) *Lyons Maid Ltd.* v. *Trebor Ltd.* [1967] R.P.C. 222.
(6) *Schweppes* v. *Gibbens* (1905) 22 R.P.C. 601, 607.
(7) *Mohamed Zainuddin bin Puteh* v. *Yap Chee Seng* [1978] 1 M.L.J. 40.
(8) *Great Western Railway Co.* v. *Birmingham and Oxford Junction Railway Co. & Ors.* 41 E.R. 1074.
(9) *Wakefield* v. *Duke of Buccleugh* (1865) 12 L.T. 628.
(10) *Cavendish House (Cheltenham) Ltd.* v. *Cavendish-Woodhouse Ltd.* [1970] R.P.C. 234.

CIVIL SUIT.

K.V. Das for the plaintiffs.

Lee Tatt Boon for the defendants.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: This is a notice of motion asking for an interlocutory injunction that the defendants, whether by their Directors, officers, servants or agents or any of them or otherwise howsoever be restrained until the trial of the action from doing all or any of the following acts, namely, the passing-off or attempting to pass off goods, namely, chicken flavoured snack foods packets by the use of a get-up similar to that used by the 1st and 2nd plaintiffs in their sale of similar products.

The 1st plaintiffs are the manufacturers under licence granted by the 2nd plaintiffs of snack foods, namely, chicken flavoured snack foods bearing the trade mark "CHICKADEES" which have been in the market since June 1977. The trade mark "CHICKADEES" has been used by the 1st plaintiffs in the get-up described in paragraph 4 of the affidavit of the General Manager dated April 18, 1979. The description of the get-up in the affidavit is as follows: —

"The chicken flavoured snack foods are sold in a cellophane or similar material packet measuring approximately 5" x 3½". The front panel has a light green background. The trade mark CHICKADEES in brinjal letters appears across the top half of the panel within an oblong-shaped space that is coloured white and light green. The words 'MAKANAN RINGAN' in red block letters appear above the trade mark. Below the trade mark appears the device of a red and white rooster strumming a guitar. To the right of the said device appear the words 'CHICKEN FLAVOURED SNACK.' At the bottom, starting from left to right are the words and figures '10SEN', 'BERAT-MINIMA', '10g', 'NETWEIGHT'. The top and bottom edges of the front panels are lined with red vertical strips. The back panel also has a light-green background. A transparent strip measuring in width approximately 6/10" runs across the centre of the panel. The trade mark CHICKADEES appears above the transparent strip. In the bottom half the letters ESP being the initials of the first plaintiffs are enclosed within a white space. Descriptions of the product also appear in Chinese, Tamil and English. The left and right edges of the panel are lined with red horizontal strips. A sample of the CHICKADEES packet is annexed hereto and marked 'Exhibit 1'."

It is also stated in the affidavit (and not seriously disputed) that the 1st plaintiffs have advertised the "CHICKADEES" trade mark extensively through the media of the press and television and have spent promotion expenditure amounting to $122,594. Gross sales for the period June 1977 to September 1978 amounted to $3,360,347 — paragraph 5 of same affidavit. It is alleged in the same affidavit that the extensive advertisement of the get-up has resulted in the "CHICKADEES" get-up becoming identified with the plaintiffs' products and none other.

The defendants are a private limited company having its registered office in Jalan Cheras, Kuala Lumpur. The defendants have after June 1977 and before the issuance of the writ in the action put upon the market snack food in packets with the get-up which the plaintiffs claim to be "a colourable imitation" of the get-up adopted by the plaintiffs as described earlier save that the word "SWEETIES" appears printed in the place occupied by the word "CHICKADEES" in both the front and back panels. A rooster coloured predominantly in red and white and flapping its wings is featured in place of the plaintiffs' rooster with a guitar. The words "MAKANAN RINGAN", "10 SEN", "CHICKEN FLAVOURED SNACK", "BERAT MINIMA", "10g", "NET WEIGHT" also appear in the front panel in positions that are claimed to be similar to those on the packet of the plaintiffs. At the back panel, representations are made in Chinese, Tamil and English as also in the case of the plaintiffs' packet. The edges of the defendants' packet are also lined in red. The defendants' packet has also a light-green background and also measures 5" x 3½" — exhibits 1 and 2 of same affidavit. The plaintiffs complained that the use by the defendants of the said get-up as described is calculated to lead to deception and to the belief that the defendants' snack foods are the snack foods of the plaintiffs and is further calculated to cause and must have caused snack foods of the defendants' manufacture to be passed off as snack foods of the plaintiffs and that the plaintiffs have thereby suffered and will suffer damage. The plaintiffs also annexed 3 exhibits, exhibits 3, 4 and 5, purporting to be statements of persons, members of the public, evidencing confusion and/or deception in the

market whereby the defendants' products have been passed off as the products of the plaintiffs.

Based on the above the plaintiffs are asking for an interlocutory injunction pending the trial of the action.

Counsel for the plaintiffs relied solely on the principles in the *American Cyanamid's* case[1] and that on the balance of convenience the interim injunction should be granted.

Counsel for the defendants objected to the motion on two grounds. Firstly, he claimed that there was undue delay in applying for an interlocutory injunction and the delay was the period between June 1977 to April 1979 when the application for interim injunction was first made. There was therefore a delay of about 22 months which delay counsel said had not been explained in the affidavit of the plaintiffs. He cited *Tavener Rutledge Ltd.* v. *Specters Ltd.*[2] where seven weeks delay was held to be fatal, *Lombard Banking Ltd.* v. *D.H. Lombard Ltd.*[3] where five months delay was held to be fatal, and *Bravingtons Ltd.* v. *Barrington Tennant*[4] where five months delay was also held to be fatal. All these cases were passing-off and trade mark cases.

Counsel for the plaintiffs' reply to this was that the delay was due to the fact that defendants originally entered conditional appearance only. To that counsel for the defendants replied that the conditional appearance was because the papers filed by the plaintiffs were not in order and that the conditional appearance was not for the purpose of delaying the proceedings but to put the records right. This is in fact confirmed by the records of the court which show that on February 7, 1979 there was a consent order to the effect that the plaintiffs be granted leave to amend the writ of summons by adding the following, namely, the address of the first plaintiffs, the address and status of the 2nd plaintiffs, the address of the solicitors for the 1st and 2nd plaintiffs, and the address of the defendants, and also to amend the statement of claim. On this point therefore I have to agree with counsel for the defendants that there was unreasonable delay in the application and that the delay was not satisfactorily explained.

The second ground of objection was that there is apparently no evidence to show irreparable damage if the injunction was not granted. In *Lyons Maid Ltd.* v. *Trebor Ltd.*[5] it was held, *inter alia,* that although no person had the right to represent his goods as those of somebody else, in an application for interlocutory relief the plaintiff had to show that there was reason to believe that he would suffer damage or that there was some other reason for maintaining the *status quo.* In that case the motion for interlocutory injunction was brought by Lyons Maid Ltd. The plaintiffs were manufacturers of iced lollipops under the name "ZOOM" and also had carried out an extensive advertising campaign. The defendants were a subsidiary company which the judge found had a nominal capital of only £2. The defendant company proposed to put their product (bubble-gum) on the market by the same name although the wrappers carried the name of their company. The plaintiffs sought an injunction. One of the grounds on which the application for interlocutory injunction was refused was that the judge was not satisfied that there was evidence to support that if no interlocutory relief was granted the plaintiffs would, pending the trial of the action, likely to suffer any damage.

Coming to the facts of this case as can be found in the affidavit supporting the motion there is in fact no evidence which can safely be relied on to say that the plaintiffs will suffer damage if the interlocutory injunction is not granted except the three letters purporting to have been written by members of the public complaining about the supposed similarity between the two packets. But looking at the two packets myself I do not think that based solely on the evidence as are available at this stage there is likelihood of real deception or confusion. Firstly, the names "CHICKADEES" and "SWEETIES" are themselves different. It is to be noticed also that even the letterings of these words are different. Below the names are pictures of a rooster but in the case of "CHICKADEES" the rooster is a cartoon rooster with a guitar whereas in the case of "SWEETIES" the rooster is nearer to what a rooster looks like. The letterings of the words "CHICKEN FLAVOURED SNACKS" are also different in both cases. The size of the particulars relating to minimum weight and net weight are also different. The lines on the edges of the packets although both are in red are not arranged in a similar manner. One more significant mark not mentioned in the affidavit is that the word "Halal" appears in romanised script in the case of "SWEETIES" but in jawi script in the case of "CHICKADEES". Off-hand the conclusion one arrives at here is that the only thing that is similar between the two packets is the colour of the background which is light-green in both cases but in my opinion that alone cannot be said to be sufficient to mislead, deceive or confuse.

In *Tavener Rutledge Ltd.* v. *Specters Ltd., supra,* Roxburgh J. in his judgment at page 501 referred to the question of passing-off. He considered the case before him to be a "borderline" one. He said the most he was prepared to say then was that the plaintiffs had not yet satisfied him of the position which is well stated by Lord Halsbury in the case of *Schweppes* v. *Gibbens*[6] where Lord Halsbury said:

> "'The whole question in these cases is whether the thing — taken in its entirety, looking at the whole thing — is such that in the ordinary course of things a person with reasonable apprehension and with proper eyesight' — and I may add looking at a reasonable distance from the object — 'would be deceived'."

In the case before him Roxburgh J. stated categorically that he was not prepared to say that a *prima facie* case had been established that a person would be deceived. I am afraid that is exactly the view that I have in this case after looking at the affidavit and hearing the submissions. The action before Roxburgh J. was in respect of an alleged infringement of trade mark and copyright, and passing-off, by the use of a container for boiled sweets resembling the plaintiffs' container. The alleged passing-off there lay in the use of the label on canisters similar to the canisters used by the plaintiffs.

Counsel for the plaintiffs cited only the *American Cyanamid's* case, *supra.* I had occasion to apply the

principles involved in Ipoh High Court Civil Suit No. 416 of 1976 (*Mohamed Zainuddin bin Puteh* v. *Yap Chee Seng*[7]) which was a notice of motion that the interlocutory injunction granted be set aside. In that case I dismissed the motion and the interlocutory injunction was to remain. The appeal to the Federal Court was subsequently dismissed. In my judgment I referred to the principles involved as follows: —

"The law in granting or refusing interlocutory injunctions has a long and interesting history and the celebrated House of Lords case of *American Cyanamid Co.* v. *Ethicon*[1] was the most recent development. The simplest approach is expressed in an earlier case of *The Great Western Railway Company* v. *The Birmingham and Oxford Junction Railway Company & Ors.*[9] where the Lord Chancellor said:

'It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights.... It is true that the court will not so interfere, if it thinks that there is no real question between the parties;... In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of the plaintiff.'

The traditional theory underlying the grant or refusal of interlocutory injunction has always been that the court abstain from expressing any opinion upon the merits of the case until the trial — see *Wakefield* v. *Duke of Buccleugh.*[9] However more recently the courts have displayed what some refer to as a more robust approach, i.e. an approach guided by the apparent strength or otherwise of the plaintiff's case as disclosed in affidavits. In 1970 in *Cavendish House (Cheltenham) Ltd.* v. *Cavendish-Woodhouse Ltd.*[10] Harman L.J. (with Salmon L.J. concurring) said: "Therefore you start off with a *prima facie* case. That, of course is the essential prelude to the granting of interlocutory relief." This approach has now been abolished by the House of Lords in the *American Cyanamid* case and new principles have been set out in the following sequence. Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits."

I agree with counsel for the defendants that the three letters purported to have been written by members of the public cannot at this stage be considered as the writers have not been called.

Therefore my conclusions are as follows: —

(1) There was unreasonable delay in applying for interim relief and the delay has not been satisfactorily explained;

(2) There is no evidence of irreparable damage to entitle plaintiffs to the interim relief; and

(3) Looking at the evidence as are available, the balance of convenience would seem to be in favour of not granting the interlocutory injunction.

However, this is in my view a fit and proper case for an early trial so that a decision can be arrived at one way or another based on all evidence as will be available during the trial. Under the circumstances I dismiss the motion but direct that the Registrar consider this case be put on the priority list for an early date for hearing. Under the circumstances of this case I have also decided to make no order as to costs.

Motion dismissed.

Solicitors: *Lawrence Tan & Co.; Skrine & Co.*

IN RE MEENAL W/O MUNIYANDI

[O.Cr.J. (Hashim Yeop A. Sani J.) December 14, 1979]
[Kuala Lumpur — Federal Territory Criminal Application No. 18 of 1979]

Habeas Corpus — Detention under order of removal and under Immigration Act — Not unlawful — Whether wife of citizen has right to entry permit — Immigration (Prohibition of Entry) Order 1963, paragraph 3 and Schedule D. — Immigration Act, 1959/63 (Act 155), ss. 15 and 33(1) — Federal Constitution, Article 15.

Constitutional Law — Citizenship — Right of wife of citizen to entry permit — Right to be registered as citizen — Immigration Act, 1959/63 (Act 155), ss. 15 and 33(1) — Federal Constitution, Article 15.

The applicant an Indian national married a Malaysian citizen and when she came to Malaysia she was given an entry permit. She lived with her husband in Malaysia until 1960 and in that year she was given the status of a permanent resident and issued with a red identity card. In November 1970 she surrendered her red identity card and returned to India. In 1977 her husband applied to the immigration authority to bring back the applicant. He was advised that the applicant could enter on a social visit pass on an Indian passport valid for a year. The applicant therefore came to Malaysia in May 1979 and was issued with a social visit pass which was extended from time to time up to May 28, 1979. On the expiry of the visit pass the immigration authority issued a special pass to enable the applicant to make the necessary arrangement to leave the country. The special pass was periodically extended until September 3, 1979 but on that day her travel documents were impounded and she was removed to prison with a view to deportation. The applicant applied for *habeas corpus* to secure her release. The questions that arose were (i) whether the applicant was lawfully detained and (ii) what is the alleged right or entitlement of the applicant as the wife of a citizen under Article 15 of the Federal Constitution and the effect of certain provisions of the Immigration Act and Immigration Regulations on her.

Held: (1) the Order of Removal under section 33(1) of the Immigration Act and the Order of Detention issued against the applicant in this case were not illegal and therefore the detention of the applicant was not unlawful;

(2) the applicant was not entitled as of right to an entry permit to enter or remain in Malaysia by reason solely of the fact that her husband is a citizen.

Case referred to:-

(1) *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 M.L.J. 156.

CRIMINAL APPLICATION.

M. Shankar (*Mahalingam* with him) for the applicant.

Zaki bin Tun Azmi (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: The facts of this case disclose a sad and unfortunate story. The facts are briefly as follows. The applicant, Meenal w/o Muniyandi, an Indian national, married her husband, a Malaysian citizen under Hindu rites some time in March 1960 in India. Shortly thereafter she was brought into Malaysia on an Indian passport and on arrival was issued with an entry permit by the Immigration Department. Apparently she lived in this country with her husband until 1970 during which time she was issued with a red identity card, thereby obtaining the status of a permanent resident. During the same period she cohabited with her husband and gave birth to a number of children of whom two are still living. In November 1970 she surrendered her red identity card and returned to India. The reason